Filed 11/15/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEVELL DOVE III, Defendant and Appellant.	E033907 (Super.Ct.No. RIF101268) OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks and Dennis A. McConaghy, Judges.† Affirmed.

Linda Casey Mackey, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Meagan J. Beale,

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II, III.D and III.E.

† Judge Hanks denied defendant's motion to discharge his retained counsel. Judge McConaghy presided over the trial and denied defendant's motion for sentencing pursuant to Proposition 36.

Supervising Deputy Attorney General, and Lise Jacobson, Deputy Attorney General, for Plaintiff and Respondent.

During a traffic stop, defendant Levell Dove III was found to have about an ounce of rock cocaine in his pocket. The jury found him not guilty of possession of cocaine base for sale (Health & Saf. Code, § 11351.5) but guilty of the lesser included offense of simple possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)). It also found him guilty of transportation of cocaine base. (Health & Saf. Code, § 11352, subd. (a).)

Although the jury had refused to find that the cocaine base was for sale, the trial court refused to find that it was for personal use. On that ground, it ruled that defendant was ineligible for probation and treatment under Proposition 36. It sentenced him instead to eight years in prison (the midterm for transportation, doubled because he admitted a "strike" prior).

In the published portion of this opinion, we will hold that a factual finding that a defendant did not possess or transport a controlled substance for personal use, for purposes of Proposition 36 sentencing, can be made by the trial court under a preponderance of the evidence standard; neither *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] nor *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] requires that it be made by a jury beyond a reasonable doubt.

In the unpublished portion of this opinion, we find no other error; hence, we will affirm.

I

FACTUAL BACKGROUND

Officer Richard Morris and his partner, Officer Bryan Dailey, stopped a car because it was speeding and because it made an illegal left turn. Defendant was the driver; he had a female passenger. Defendant did not appear to be under the influence of drugs.

With defendant's consent, Officer Morris conducted a pat-down search. In defendant's right front pants pocket, he found two large rocks and a number of smaller pieces of what appeared to be cocaine, along with $115.45 in cash. Subsequent testing confirmed that the large rocks were cocaine base, cut with novocaine, weighing a total of 27.78 grams.

Defendant did not have any scales, ledgers, "pay-owe sheets," baggies, cell phones, or pagers.

When the passenger was searched, she was found to have approximately $600 in cash, mostly in $20 bills, along with food stamps and welfare documents.

In Officer Morris's expert opinion, the "large amount" of drugs found on defendant indicated that defendant possessed them for sale. Rock cocaine is typically sold in small amounts, for $10 or $20. The average addict would use one $5 or $10 rock a day; a daily user could make one gram last a week to two weeks.

Officer Morris testified that, unlike a methamphetamine dealer, a rock cocaine dealer did not need a scale because he or she could just break off a piece of the appropriate size. He further testified that "[s]ometimes" drug dealers work in teams, with one person carrying the drugs and another person carrying the money.

Officer Dailey, also testifying as an expert, agreed that defendant possessed the drugs for sale. His opinion was based on the amount of the cocaine and on the amount and the denominations of money found. He testified that rock cocaine is typically sold in $10 or $20 pieces. Twenty dollars would buy about a quarter of a gram. An ounce of rock cocaine, if broken up and sold at "street level," would be worth about $3,000. He also testified that it is "very common" for a drug dealer to have a lot of $20 bills.

Officer Dailey testified that rock cocaine dealers typically do not have either scales or pay-owe sheets. They can just "eyeball" a rock to determine its weight and value. He admitted that the possession of a cell phone "does add to a case. . . . However, there are other means to [communicate]."

Deputy Kevin Dorrough testified as an expert on drug sales. In his opinion, "based upon just the quantity alone, in addition to the money," defendant was in possession for sale. The amount of cocaine found "far exceeds what somebody would possess just for personal use." Rock cocaine is typically sold in $20 amounts, weighing about a tenth of a gram. A typical user would not have enough money at any one time to buy more than one or two $20 rocks. Deputy Dorrough estimated that an ounce of rock cocaine would last the heaviest user from 10 days to a month. He testified: "[M]aybe someone like Robert Downey, Jr., . . . could . . . possess an ounce of rock cocaine." But

"[i]n my nine years as a deputy, . . . I've [n]ever met a user . . . who could afford an ounce of rock cocaine . . . ." He admitted, however, that he did not know what defendant's financial status was.

According to Deputy Dorrough, even a street-level dealer would have no more than ten to fifteen $20 rocks at a time. The amount of rock cocaine defendant had was "ready for sale to the street[-]level dealer." It might have cost him $1,000 to $1,500 to buy, but it could be broken up and sold on the street for about $3,000.

The $115 found on defendant supported Deputy Dorrough's opinion, but, he testified, "[i]f he didn't have the money, it wouldn't change my opinion."

Deputy Dorrough testified that scales are typically found with methamphetamine, powder cocaine, and marijuana, but not with rock cocaine, because a dealer could just break off a rock for sale. "You don't find pay-owe sheets . . . [b]ecause if you don't have the $20, you're not getting the rock." Finally, you would not necessarily find packaging, because a rock could be carried in the hand, mouth, or rectum.

II

THE DENIAL OF DEFENDANT'S MOTION TO DISCHARGE HIS RETAINED COUNSEL

Defendant contends the trial court erred by denying his motion to discharge his retained counsel.

A. *Additional Factual and Procedural Background*.

Initially, defendant was represented by the public defender. In October 2002, however, he retained private counsel.

Trial was set for April 21, 2003, but trailed to April 30, 2003. On that day, there was this discussion:

"THE DEFENDANT: I want a Marsden [h]earing, Your Honor.

"THE COURT: Your attorney is privately retained?

"THE DEFENDANT: Yes.

"THE COURT: Yes. Marsden doesn't apply.

"THE DEFENDANT: I can't afford him no more and I'm kind of -- I don't even want him served no more.

"THE COURT: You hired him, sir, and this is the day of trial. And if he wasn't your lawyer anymore, then we would have to start all over again with a different lawyer. So it's getting too late to do that. You hired him as your lawyer. And if you got somebody else that wants to step in right now and is ready for trial, I'll let him do that, but we aren't going to put this off and start the whole process over again with a different lawyer.

"THE DEFENDANT: I'm kind of scared. I can't afford to pay him anymore.

"THE COURT: He's not getting off the case. Whatever you pay him is what he's going to have, and he's going to have to try the case based on that. I don't get involved in your payment situations. I only get involved in relieving or not relieving attorneys [at] trial.

"So at this point, your motion to have him replaced, I guess I'll put it that way, is denied."

The case was trailed to the following day, May 1, and then to May 7, May 14, and May 15, 2003, when it actually began. Defendant's retained counsel continued to represent him throughout.

B. *Analysis*.

The controlling case is *People v. Ortiz* (1990) 51 Cal.3d 975. There, the defendant moved several times to discharge his two retained attorneys and to have new counsel appointed, based in part on their assertedly unsatisfactory performance, but also based on his inability to pay them. (*Id*. at pp. 979-981.) The trial court denied the motions because the defendant had not shown that his attorneys were inadequate or incompetent. (*Id*. at pp. 979, 981, 987.) After "[a] series of continuances," the defendant stipulated to submit the case on the preliminary hearing transcript and was found guilty. (*Id*. at p. 981.)

The Supreme Court held that the defendant was entitled to discharge his retained counsel without showing that they were incompetent. It began by noting that a *nonindigent* defendant has a "right . . . to discharge his retained attorney, with or without cause . . . ." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 983.) This right "is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]. . . . The trial court, however, must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an

empty formality.' [Citation.]" (*Ibid*., quoting *People v. Gzikowski* (1982) 32 Cal.3d 580, 587 and *People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

It then held: "[T]he reasons supporting the right of a nonindigent criminal defendant to discharge his retained counsel favor extension of that right to all criminal defendants, regardless of their economic status." (*People v. Ortiz*, *supra*, 51 Cal.3d at p. 984.) "In fact, . . . it may be even more important for an indigent defendant to be able to discharge retained counsel: if his motion is denied, he must choose between proceeding with no legal assistance or continuing with a retained attorney reluctantly serving on a pro bono basis." (*Id*. at pp. 984-985.)

Here, the trial court denied defendant's motion as untimely. *Ortiz* explicitly states that a motion to discharge retained counsel may be denied if it is so untimely that granting it would disrupt the orderly processes of justice. It also states that such a ruling is discretionary. (*People v. Ortiz, supra,* 51 Cal.3d at pp. 983-984; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1105-1106 [denial of *Faretta* motion as untimely is discretionary].) Accordingly, we review the denial under the deferential abuse of discretion standard of review.

In *People v. Turner* (1992) 7 Cal.App.4th 913, the court upheld the denial of a motion to discharge retained counsel that had been brought on the day set for trial as untimely: "[T]he substitution of counsel on the morning of trial would certainly have led to a continuance, and the trial court properly found that such a disruption would be unreasonable under the circumstances." (*Id*. at p. 919; accord, *People v. Lau* (1986) 177

Cal.App.3d 473, 479 [trial court could find that motion made when jury selection was about to begin was untimely].)

Here, the motion was made on *a* day set for trial. As defendant notes, however, the trial was repeatedly trailed -- originally for one day, but ultimately for about two weeks. Nevertheless, the trial court's denial of defendant's motion was reasonable; it could not be called a "myopic insistence upon expeditiousness . . . ." The trial court had no way of knowing when the case would actually go to trial. It had been trailing for nine days already. We may presume that, when the trial court ordered the case to trail one more day, it acted in good faith, and it genuinely believed the trial might start then. Moreover, any new appointed counsel would have needed time to prepare, and presumably not just a week or two. No reasonable attorney would have gambled on the possibility that the trial would continue to trail long enough for him or her to get up to speed. Thus, granting defendant's motion would have required a continuance. Under these circumstances, the trial court did not abuse its discretion by denying defendant's motion as untimely.

In the heading of his argument, defendant claims the trial court erred "by failing to properly investigate *why* [he] wanted to replace his retained attorney . . . ." (Capitalization omitted; italics added.) His entire argument on this point, however, consists of a single sentence: "Here the court made no meaningful inquiry as to the source of the problem between appellant and his attorney." He cites no authority for the proposition that the trial court was required to do so. Quite the contrary, his main argument, based on *Ortiz*, is that he had an absolute right to discharge his retained

attorney, for any reason or for no reason. Defendant has waived any argument that the trial court had some duty of inquiry that it failed to fulfill. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Out of an excess of caution, however, we note that defendant plainly had one reason, and only one, for wanting to discharge his retained counsel -- he could no longer afford him. Defendant never indicated that he had any other concerns about the quality of the representation he was receiving. Accordingly, the trial court did not have the duty of inquiry it might have had if defendant had asserted ineffective assistance of counsel. (See *People v. Marsden* (1970) 2 Cal.3d 118, 123-124.) Moreover, it did not cut defendant off or refuse to let him state any other grounds for the motion that he may have had. Under the circumstances, its inquiry was adequate.

III

PROPOSITION 36 SENTENCING

Defendant raises several contentions concerning the trial court's refusal to sentence him pursuant to Proposition 36.

A. *Statutory Background*.

The Substance Abuse and Crime Prevention Act of 2000, commonly known as (and hereafter referred to as) Proposition 36, is codified at Penal Code sections 1210, 1210.1, and 3063.1, and division 10.8 (§ 11999.4 et seq.) of the Health and Safety Code. It "'dramatically changed the penal consequences for those convicted of nonviolent drug possession offenses.' [Citation.]" (*People v. Guzman* (2003) 109 Cal.App.4th 341, 346, quoting *People v. Letteer* (2002) 103 Cal.App.4th 1308, 1322, fn. 8.)

"Nonviolent drug possession offense," as defined in Proposition 36, includes "the unlawful personal use, possession for personal use, or transportation for personal use" of specified controlled substances, including cocaine base. (Pen. Code, § 1210, subd. (a); see also Health & Saf. Code, § 11054, subd. (f)(1).) It excludes "the possession for sale" of any controlled substance. (*Ibid*.)

Proposition 36 then provides: "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation." (Pen. Code, § 1210.1, subd. (a).) One of the specified exceptions applies when the "defendant . . . previously has been convicted of one or more serious or violent felonies" within the preceding five years. (Pen. Code, § 1210.1, subd. (b)(1).) Another exception applies when the "defendant . . . , in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of . . . any felony." (Pen. Code, § 1210.1, subd. (b)(2).)

B. *Additional Factual and Procedural Background*.

Defendant filed a written motion for sentencing pursuant to Proposition 36. First, he noted that his strike prior was a juvenile adjudication and therefore did not disqualify him from Proposition 36 sentencing. (See *People v. Westbrook* (2002) 100 Cal.App.4th 378, 383-385.) Second, he noted that, on count 1, the jury had acquitted him of possession for sale but found him guilty of the lesser included offense of simple possession. He argued that the jury must have found that the possession charged in count 1 -- and, moreover, the transportation, at the same time of the same cocaine base, charged in count 2 -- were for personal use and not for sale.

At the sentencing hearing, defense counsel noted again that defendant's strike prior did not disqualify him from sentencing under Proposition 36. The trial court responded:

"THE COURT: But this is all premised on the fact that I would be willing to make a finding that the transportation was for personal use. And I am not willing to do that.

"[DEFENSE COUNSEL]: That was my other argument, that based on the fact that the jury found my client not guilty of possession for sales, therefore the --

"THE COURT: But I heard the evidence.

"[DEFENSE COUNSEL]: -- inference would be that he was guilty of possession for personal use.

"THE COURT: But I heard the evidence.

"[DEFENSE COUNSEL]: Okay.

"THE COURT: So I'm not only not inclined, but I am not going to make that finding so he can get probation. I don't think he deserves probation, is the bottom line."

C. *Apprendi/Blakely Error*.

Defendant contends that, under the federal constitution, the finding, for purposes of Proposition 36, that the possession and transportation of the drugs were not for personal use had to be made both by a jury and beyond a reasonable doubt.

In his opening brief, defendant relied on *Apprendi v. New Jersey*, *supra*, 530 U.S. 466. *Apprendi* held that: "Other than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.)

Three California cases, however, have held that a trial court's finding that a defendant is ineligible for Proposition 36 sentencing does not increase the penalty for a crime beyond the statutory maximum and therefore does not violate *Apprendi*.

First, in *People v. Barasa* (2002) 103 Cal.App.4th 287, Division One of this appellate district held that *Apprendi* does not apply to a personal use finding under Penal Code section 1210.1: "In this case, the issue concerns a sentencing provision which lightens, rather than increases, punishment for crime. Because Penal Code section 1210.1 effects a sentencing *reduction*, rather than an *increase* in the 'prescribed statutory maximum' sentence, the analysis of a related sentencing provision which also provides for a possible mitigation of punishment, rather than an increase in the prescribed statutory maximum punishment, is applicable." (*Barasa*, at p. 294.) The court also analogized to cases holding that *Apprendi* does not apply to factual findings under Penal Code section 654. (*Barasa,* at p. 295, citing *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022.)

Thereafter, in *People v. Glasper* (2003) 113 Cal.App.4th 1104, the Sixth District likewise held that *Apprendi* does not apply to a personal use finding under Penal Code section 1210.1: "We agree with the *Barasa* court that *Apprendi* does not apply here because 'the issue concerns a sentencing provision which lightens, rather than increases, punishment for crime. Because Penal Code section 1210.1 effects a sentencing *reduction,* rather than an *increase* in the "prescribed statutory maximum" sentence, the analysis of a related sentencing provision which also provides for a possible mitigation of

punishment, rather than an increase in the prescribed statutory maximum punishment, is applicable.' [Citation.]" (*Glasper*, at p. 1115, quoting *People v. Barasa*, *supra*, 103 Cal.App.4th at p. 294.)

Curiously, *Glasper* did not cite a significant intervening case, *In re Varnell* (2003) 30 Cal.4th 1132. Even more curiously, none of the parties here have cited it, either. In *Varnell*, the main issue was whether a trial court has the power under Penal Code section 1385 to strike a prior conviction so as to make the defendant eligible for Proposition 36 sentencing. (*Varnell*, at pp. 1134-1135.) Our Supreme Court held it does not.

It reasoned, in part, that Penal Code section 1385 allows the trial court to strike only charges and allegations, and a prior conviction, when used for this purpose, does not have to be pleaded. (*In re Varnell*, *supra*, 30 Cal.4th at pp. 1137, 1139.) The defendant, however, argued that such a prior conviction must be pleaded and proved as a matter of due process. (*Id*. at p. 1141.) The Supreme Court disagreed; in the process, it specifically distinguished *Apprendi*: " . . . *Apprendi* . . . holds that any fact that increases the penalty for a crime beyond the statutory maximum prescribed for that crime must be submitted to a jury and proved beyond a reasonable doubt. [Citations.] Here, since the statutory maximum for petitioner's crime is three years in prison [citation], no finding by the trial court *increased* the penalty beyond the statutory maximum. [Citation.] Moreover, nothing in [Penal Code] section 1210.1 could have created an enhancement to petitioner's sentence since, when it applies, section 1210.1 *reduces* the potential punishment. [Citations.]" (*Varnell*, at pp. 1141-1142.) The Supreme Court cited *Barasa* with approval. (*Varnell*, at p. 1142.)

Defendant urges us to reject *Barasa* and *Glasper*. Even if we were inclined to do so -- which we are not -- we would be bound to follow *Varnell*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

Defendant also argues that *Barasa* and *Glasper* (and, implicitly, *Varnell*) are no longer good law in light of *Blakely v. Washington*, *supra*, 124 S.Ct. 2531. *Blakely* held "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 2537.) Thus, *Blakely*, like *Apprendi* before it, draws a bright line between a finding that increases a sentence and a finding that reduces a sentence. We therefore continue to be bound by our Supreme Court's holding in *Varnell* that Proposition 36 reduces the sentence that would otherwise apply.

But even if we were to reexamine the question independently, we would come to the same conclusion.

In *Blakely*, the defendant pleaded guilty to second degree kidnapping and admitted using a firearm. (*Blakely v. Washington*, *supra*, 124 S.Ct. at pp. 2534-2535.) Under Washington's sentencing scheme, the "standard range" for such an offense was 49 to 53 months. (*Id*. at p. 2535.) However, the trial court could impose an exceptional sentence, above the standard range, for "substantial and compelling reasons," including but not limited to specified aggravating factors. (*Ibid*., quoting Wash. Rev. Code. Ann.

§ 9.94A.120(2).) If it did impose an exceptional sentence, it had to set forth findings of fact and conclusions of law in support. (*Id*. at p. 2535.) Based on a finding that the defendant had acted with "deliberate cruelty," the trial court imposed a sentence of 90 months. (*Ibid*., quoting Wash. Rev. Code. Ann. § 9.94A.390(2)(h)(iii).)

The Supreme Court held that this finding increased the sentence above the statutory maximum. (*Blakely v. Washington*, *supra*, 124 S.Ct. at pp. 2537-2538.) The state, noting that even an exceptional sentence could not exceed 10 years, argued that 10 years was the true statutory maximum. (*Id*. at p. 2537.) The Supreme Court disagreed: "The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. . . . Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. [Citation.]" (*Id*. at pp. 2537-2538.)

Here, "[w]hen a defendant is eligible for Proposition 36 treatment, it is mandatory unless he is disqualified by other statutory factors . . . . [Citation.] Placement of eligible defendants in Proposition 36 programs is not a discretionary sentencing choice made by the trial judge and is not subject to the waiver doctrine. [Citation.]" (*People v. Esparza* (2003) 107 Cal.App.4th 691, 699.) However, when a defendant is ineligible, a prison sentence is equally mandatory. Sometimes, as in this case, a jury's verdict will not necessarily determine whether the defendant is eligible or ineligible. This poses some difficulty in discerning which is the statutory maximum.

But an additional holding in *Barasa* is that the defendant has the burden of proving that the possession or transportation was for personal use. (*People v. Barasa*,

supra, 103 Cal.App.4th at pp. 295-296.) Also, unlike the findings underlying an exceptional sentence in *Blakely*, the trial court's finding that the possession or transportation was not for personal use need not be stated on the record. If the trial court imposes a prison sentence, we will imply the necessary finding. Moreover, we will sustain that implied finding as long as it is supported by substantial evidence. (Cf. *People v. Carl B.* (1979) 24 Cal.3d 212, 218 [trial court's implied finding that defendant is not amenable to CYA is subject to substantial evidence review]; *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [trial court's implied finding that Pen. Code, § 654 does not apply will be upheld on appeal if supported by substantial evidence].) Thus, unless the evidence shows personal use as a matter of law, a prison sentence is not subject to reversal merely because the trial court failed to make an express finding of personal use. And whether the evidence shows personal use as a matter of law is, tautologically, a question of law, not a finding of fact.

Accordingly, the trial court could have imposed a prison sentence based on the fact, as found by the jury, that defendant transported cocaine base. Unlike an exceptional sentence in *Blakely*, such a prison sentence would not be subject to reversal merely because the trial court failed to articulate some additional finding. In one sense, an additional finding would be necessary; but we would presume it to have been made. Moreover, if defendant failed to meet his burden of proof, it would be made automatically. Thus, it most nearly resembles a finding, under the Washington scheme, that there are *no* substantial and compelling reasons for an exceptional sentence.

We also consider it significant that Proposition 36 was intended, in part, "[t]o *divert* from incarceration into community-based substance abuse treatment programs nonviolent defendants . . . charged with simple drug possession or drug use offenses . . . ." (Prop. 36, § 3.) Thus, in enacting Proposition 36, the electorate understood incarceration to be the preexisting standard penalty; it intended probation and treatment to reduce the penalty that would otherwise apply.

We conclude that neither *Apprendi* nor *Blakely* prohibited the trial court from deciding, based on the preponderance of the evidence, whether defendant's possession or transportation was for personal use for purposes of Proposition 36.

Finally, the acquittal on the charge of possession for sale did not bind the trial court. The acquittal simply meant the jury was not convinced beyond a reasonable doubt that the possession was for sale. Precisely because *Apprendi* and *Blakely* did not apply, the trial court was free to redetermine the personal use issue based on the preponderance of the evidence. (*U.S. v. Watts* (1997) 519 U.S. 148, 157 [117 S.Ct. 633, 136 L.Ed.2d 554] ["a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"]; *People v. Lent* (1975) 15 Cal.3d 481, 486-487; *People v. Lewis* (1991) 229 Cal.App.3d 259, 264; *People v. Levitt* (1984) 156 Cal.App.3d 500, 519, fn. 5; *contra*, *People v. Takencareof* (1981) 119 Cal.App.3d 492, 497-500.)

D. *The Propriety of the Trial Court's Stated Reasons*.

Defendant contends the trial court really refused to sentence him under Proposition 36 for an improper reason -- because he did not deserve probation -- rather than because he possessed or transported the drugs for sale. This argument is based on the trial court's comment, " . . . I am not going to make that finding so he can get probation. I don't think he deserves probation, is the bottom line."

Preliminarily, defendant waived this contention by failing to object at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353.) But even if not waived, the contention lacks merit.

"As an aspect of the presumption that judicial duty is properly performed, we presume . . . that the court . . . is able to distinguish . . . relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "These general rules concerning the presumption of regularity of judicial exercises of discretion apply to sentencing issues. [Citations.]" (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) For example, the trial court is presumed to have considered all of the relevant sentencing criteria, "unless the record affirmatively reflects otherwise." (Cal. Rules of Court, rule 4.409.)

"A judge's subjective belief regarding the length of the sentence to be imposed is not improper as long as it is channeled by the guided discretion outlined in the myriad of statutory sentencing criteria. [Citations.]" (*People v. Castaneda* (1999) 75 Cal.App.4th

611, 614.) We believe the same is true concerning a judge's subjective belief regarding the defendant's eligibility for Proposition 36 sentencing.

Here the trial court stated, on the record, that the key sentencing factor was whether the transportation was for personal use or for sale. It also stated, on the record, that its adverse finding on that factor was based on the evidence at trial -- " . . . I heard the evidence." Finally, by stating, "So I'm *not only* not inclined, *but* I am not going to make that finding" (italics added), it indicated that its subjective inclination accorded with its objective finding.

In sum, the trial court simply felt that defendant deserved the sentence that it found to be legally appropriate. This was not error.

E. *The Sufficiency of the Evidence That the Possession and Transportation Were Not for Personal Use*.

Finally, defendant contends there was insufficient evidence to support the trial court's finding that the possession and transportation were not for personal use.

Preliminarily, this contention upends the burden of proof. As we discussed in part III.C, *ante*, *defendant* had the burden of proving that the possession and transportation *were* for personal use. Accordingly, "[a]bsent indisputable evidence of [personal use] -- evidence no reasonable trier of fact could have rejected -- we must therefore affirm the [trial] court's determination." (*In re Sheila B*. (1993) 19 Cal.App.4th 187, 200.)

Defendant argues, "The police expert based his opinion that the drugs were for sale on the quantity alone." This is incorrect, in two respects. First, there were three police experts. Second, all three testified that their opinions were also based on, or at

least supported by, the amounts and denominations of money found on defendant and his passenger. The passenger's possession of $600, mostly in twenties, was particularly suspicious in light of her simultaneous possession of food stamps and welfare documents. Officer Morris testified that it is not uncommon for a dealer to carry the drugs while having an accomplice carry the money.

In any event, the experts could properly base their opinions solely on the quantity of the drug found. "Intent to sell can be established circumstantially by the quantity of the drugs in defendant's possession. [Citations.]" (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1614, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867; accord, *People v. Carter* (1997) 55 Cal.App.4th 1376, 1377-1378; *People v. Peck* (1996) 52 Cal.App.4th 351, 357 [Fourth Dist., Div. Two]; see also *People v. Parra* (1999) 70 Cal.App.4th 222, 227 [Fourth Dist., Div. Two] [quantity plus absence of drug paraphernalia].)

Defendant also recounts all of the evidence tending to show that the transportation was not for sale, including the absence of scales, ledgers, baggies, cell phones, or pagers, and the officers' inability to rule out the possibility that defendant was as well-funded as Robert Downey, Jr. The officers also testified, however, that rock cocaine dealers do not necessarily have or need scales, ledgers, etc. Also, although the officers did acknowledge the theoretical possibility that a person might be in possession of as much as an ounce of rock cocaine for personal use, they all agreed that this was virtually unheard of. Deputy Dorrough testified that in nine years as a police officer, he had never seen such a thing. This evidence merely raised a factual issue for the trial court to resolve.

We conclude that there was sufficient evidence to support the trial court's finding that the possession and transportation were not for personal use.

IV

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.